Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *S. D. v. Minister of Employment and Social Development*, 2016 SSTADIS 396

Tribunal File Number: AD-16-641

BETWEEN:

S. D.

Appellant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: October 12, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] This is an appeal of the decision of the General Division (GD) of the Social Security Tribunal issued on February 10, 2016, which dismissed the Appellant's application for a disability pension on the basis that he did not prove that his disability was severe, for the purposes of the *Canada Pension Plan* (CPP), by his minimum qualifying period (MQP) of December 31, 2011. Leave to appeal was granted on September 12, 2016, on the grounds that the GD may have erred in rendering its decision.

OVERVIEW

[3] The Appellant submitted an application for CPP disability benefits on September 30, 2013. He indicated that he was 58 years old and had a Grade 10 education from India, his country of origin. After immigrating to Canada in 1990, he worked in a plastics plant for 14 years and then held a series of temporary manual labour jobs. He had just been laid off from one of these jobs in October 2010, when he was involved in a motor vehicle accident, leaving him with soft tissue injuries and ongoing pain to his lower back neck shoulders and knees.

[4] The Respondent denied his application at the initial and reconsideration levels on the grounds that his disability was not severe and prolonged as of the MQP date. On July 15, 2014, the Appellant appealed these denials to the GD

[5] At the videoconference hearing before the GD on January 6, 2016, the Appellant testified that his impairments prevented him from engaging in routine physical activities. He said that he further injured his back in a December 2011 slip and fall accident and had since had a stroke and broken his hip.

[6] In its decision, the GD found that the Appellant's disability fell short of the requisite severity threshold, noting that none of his specialists had reported any severe diagnostic findings. While the GD acknowledged that Appellant suffered from some impairments, it was

not persuaded that they precluded him from regularly pursuing any substantially gainful occupation. It also found that, despite having residual capacity, the Appellant had not made sufficient effort to find non-physical work that would better accommodate his limitations.

[7] On May 4, 2016, the Appellant's representative filed an application for leave to appeal with the Appeal Division (AD) of the Social Security Tribunal alleging errors of fact and law on the part of the GD. On September 12, 2016, the AD granted leave on the grounds that the GD may have erred in by failing to apply the principles from *Villani v. Canada.*[1]

[8] I have decided that an oral hearing is unnecessary and the appeal can proceed on the basis of the documentary record for the following reasons:

(a) There are no gaps in the file or need for clarification;

(b) The form of hearing respected the requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[9] The Appellant's submissions were set out in his application for leave to appeal. On September 30, 2016, the Respondent submitted a letter agreeing that the appeal should be allowed.

THE LAW

[10] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) the only grounds of appeal are:

(a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[1] *Villani v. Canada (Attorney General),* 2001 FCA 248

[11] According to subsection 59(1) of the DESDA, the AD may dismiss the appeal, give the decision that the GD should have given, refer the matter back to the GD for reconsideration in accordance with any directions that the AD considers appropriate or confirm, rescind or vary the decision of the AD in whole or in part.

[12] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an Appellant must:

(a) Be under 65 years of age;

(b) Not be in receipt of the CPP retirement pension;

(c) Be disabled; and

(d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[13] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[14] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

ISSUES

[15] The issues before me are as follows:

(a) Did the GD err in failing to apply *Villani*?

(b) If so, what remedy is appropriate in this case?

SUBMISSIONS

[16] The Appellant submits that the GD erred in law by failing to apply *Villani* principle, which demands that the severe criterion must be assessed in a real-world context, taking into account factors such as age, level of education, language proficiency, and past work and life experience.

[17] As noted above, the Respondent conceded this position and recommended that the matter be returned to the GD.

ANALYSIS

[18] Having reviewed the evidence and law, I must agree with the parties that the GD erred in law in rendering its decision. While the GD duly summarized the ratio of *Villani* at the outset of its analysis, I saw no attempt to meaningfully apply it to the particular circumstances of the Appellant. As indicated in its summary of the evidence, the GD was well aware that the Appellant was an immigrant to this country, with poor English-language skills, who was in his mid-fifties at the time of MQP. It also noted that he had spent his working life performing manual labour and possessed limited familiarity with computers. Despite this, the GD's analysis, aside from the *pro forma* citation of *Villani*, was comprised entirely of a discussion of the Appellant's claimed medical impairments and what was purportedly his insufficient effort to return to work. While these were important considerations, they should have been discussed in the context of the Appellant as a whole person. In short, it was incumbent on the GD to take a hard look at the real-world employability of a person with this Appellant's profile.

CONCLUSION

[19] For the reasons discussed above, the appeal succeeds on the ground for which leave was allowed.

[20] Section 59 of the DESDA sets out the remedies that the AD can give on appeal. To avoid any apprehension of bias, it is appropriate in this case that the matter be referred back to the GD for a *de novo* hearing before a different GD member.

Member, Appeal Division